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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. ANDRES ALEJANDRO CORDOVA, Defendant and Appellant.	C084661 (Super. Ct. No. CRF164827)

A jury found defendant Andres Alejandro Cordova guilty of attempted murder as well as various other criminal charges and enhancements based on firearm use and possession, all stemming from the car-to-car shooting of victim Andrew Crimmins. A prior strike and prior prison term enhancement allegation (the nature of which is the subject of much ink on this appeal, as we discuss *post*) were also found to be true.

The trial court sentenced defendant to life in prison plus 20 years for a gun use enhancement on the attempted murder count and an aggregate determinate sentence of nine years eight months for the additional charges and a robbery case not before us.

In four rounds of briefing, which we address out of order, defendant claims the trial court erred in denying his motion for new trial. He challenges his Penal Code sections 667 and 667.5 enhancements as well as his two firearm enhancements, pursuant to both then-existing and new law.[1] He argues the trial court erred failing to stay various aspects of his sentence and abused its discretion at sentencing in various respects; he also requests remand for determination of his ability to pay certain fees and points out error in the abstract of judgment.

The Attorney General concedes error or the need for remand on several of the claims as well as the need for correction of the abstract of judgment. We agree with the parties as to the conceded claims, address the remaining claims, affirm the judgment as modified, and remand with directions for exercise of sentencing discretion, correction of unauthorized terms, full resentencing, and preparation of a new abstract of judgment.

FACTS AND PROCEDURAL HISTORY

We recite only limited details of the trial testimony here; we add additional details regarding certain of the witnesses' testimony when necessary to flesh out our discussion of several of defendant's appellate claims, *post*.

Lacey Moyer dated defendant and had a child with him. Victim Crimmins and Moyer were friends. About two months before the shooting at the center of this case, defendant threatened Crimmins because Crimmins was talking to Moyer. Defendant told Crimmins that if defendant found out Crimmins was talking to Moyer again, it was "gonna be bad."

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[1] Further undesignated statutory references are to the Penal Code.

Moyer communicated with Crimmins by text on August 15, 2016. Defendant subsequently called or sent Crimmins a text, upset that Crimmins had contacted Moyer. Defendant told Crimmins that Moyer put Crimmins in a predicament and defendant had to do something to Crimmins. Defendant and Crimmins agreed to meet and fight. Crimmins believed it would be a fist fight. Defendant sent Crimmins a text message stating, "I am here" but Crimmins did not see defendant at the location where they had agreed to meet.

Crimmins' friend, Matthew Nichols, and Crimmins' sister went to the location where Crimmins was waiting for defendant and convinced Crimmins to leave. Nichols drove and Crimmins sat in the front passenger seat. A dark sedan pulled in front of them.[2] As Crimmins looked at the dark sedan, he saw a flash and heard at least two or three pops.

Crimmins was shot above his right eye and also injured in his chest or right shoulder area. The front passenger's side tire of Crimmins' car was blown out. There was what appeared to be a bullet hole in the center of his windshield.

Defendant owned a dark colored 2006 Nissan Ultima. No firearm was located in relation to the shooting. No one other than defendant had threatened Crimmins or challenged Crimmins to fight in the time leading up to the shooting. The only people who knew that Crimmins would be at the location where the shooting occurred were Nichols, Crimmins' sister, and defendant. Crimmins told a police officer that he believed defendant was the shooter. But at trial, Crimmins was a reluctant witness and testified he did not know whether defendant was the shooter.

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[2] Woodland Police Officer Brandon Swonger interviewed Crimmins and Nichols on the day of the shooting. Swonger was told the suspect car was a newer model, four-door white sedan.

Nichols did not see how many people were in the suspect vehicle but saw the back of a bald, brown head as he was ducking and speeding away after the shooting. Nichols testified at trial that the head he saw on the day of the shooting did not look like defendant's head.

The parties stipulated that defendant was previously convicted of a felony and was prohibited from possessing firearms or ammunition.

The jury found defendant guilty of the attempted murder (with premeditation and deliberation) of Crimmins (count 1; §§ 187, subd. (a), 664, subd. (a)), shooting at an occupied vehicle (count 2; § 246), three counts of assault with a firearm (counts 3, 4 & 5; § 245, subd. (a)(2)), possession of a firearm by a felon (count 6; § 29800, subd. (a)(1)), and possession of ammunition by a person prohibited from possessing a firearm (count 7; § 30305, subd. (a)). The jury found true the allegations that the attempted murder (count 1) was willful, deliberate, and premeditated; that defendant personally discharged a firearm within the meaning of section 12022.53, subdivision (c); and that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b). With regard to counts 3, 4, and 5, the jury found true the allegation that defendant personally used a firearm within the meaning of section 12022.5, subdivision (
). Upon defendant's waiver of a jury trial, the trial court found the section 667 prior strike and section 667.5, subdivision (a) prior prison term enhancement to be true.

The trial court imposed a sentence of 14 years to life in prison, plus 20 years for the section 12022.53, subdivision (c) enhancement on count 1, imposing and staying 10 years for the subdivision (b) enhancement. The court imposed 14 years on count 2 (the upper term, doubled) and two years on counts 3, 4, and 5 and the corresponding

enhancements, all stayed pursuant to section 654.[3] On counts 6 and 7, the trial court imposed a consecutive one-third the midterm on each count, which is 16 months for each count. It added a five-year term for the section 667, subdivision (a)(1) enhancement and one year for the prior prison term enhancement (which it characterized as a "section 667.5(a)" enhancement despite imposing a one-year term rather than the statutorily mandated three-year term), to run consecutively to the other terms.

DISCUSSION

I

New Trial Motion

Defendant argues the trial court erred in denying his motion for new trial based on both newly discovered evidence and an alleged violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). We see no error.

A. *Background*

Defendant moved for a new trial on the ground that after the trial he discovered new evidence that Moyer had a sexual relationship with former Woodland Police Officer Luttrell, the police conducted a shoddy investigation to cover up the officer's misconduct, and the prosecutor should have but failed to disclose evidence of the alleged sexual relationship. The motion was supported by a memo by a defense investigator regarding statements Moyer made to the investigator. According to the memo, Moyer said Luttrell sent her sexually graphic text messages, defendant saw those text messages and took Moyer's cell phone, Moyer felt pressure to have sex with the officer, and Moyer told the prosecutor of the alleged sexual relationship. Defendant argued the new evidence would

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[3] As we discuss, *post*, sentences stayed pursuant to section 654 must be full-term sentences. We will direct correction of these unauthorized sentences (counts 3, 4, 5, and their enhancements) on remand.

have cast doubt on Moyer's credibility and the People should have provided the information under *Brady, supra,* 373 U.S. 83.

The prosecutor denied that Moyer ever told him about an alleged affair with Luttrell. He said he was not aware of the nature of the allegation against Luttrell such that it might have required disclosure under *Brady*. He acknowledged that he knew there was an internal affairs investigation involving Luttrell, but said he (the prosecutor) was not aware of the result of that investigation and Luttrell was not a witness in defendant's trial. He added that, based on the defense investigator's memo, defendant knew of the sexually charged text messages. He argued that the evidence regarding Moyer's alleged sexual relationship with Luttrell was not newly discovered evidence and the evidence would not have led to a different result at trial even had it been presented.

The trial court denied the new trial motion, finding that: "The defense concedes that defendant had knowledge that some relationship between Officer Luttrell and Ms. Moyer existed before this trial, and so he had access to that information and had a duty to pursue that, if he thought it was relevant. To come forward after the trial and say, I didn't bother to look in to that and, therefore, I didn't know it was there, when I had information that would lead me to look at it doesn't amount to newly discovered evidence, and so the new trial motion based on newly discovered evidence is denied." While defense counsel offered defendant's testimony that he was unaware of the alleged affair between Luttrell and Moyer, the court pointed out that the motion said otherwise. The court found defendant was not entitled to a new trial when he had information available to him and he chose neither to tell his own lawyer nor otherwise act on the information.

B. *Newly Discovered Evidence*

A trial court may grant a defendant's motion for a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 1181, subd. 8.) " 'In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the

following factors: " '1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.' " [Citations.]' " (*People v. Howard* (2010) 51 Cal.4th 15, 43.) The burden of proof is with the defendant. (*People v. McDaniel* (1976) 16 Cal.3d 156, 178; *People v. Loar* (1958) 165 Cal.App.2d 765, 780 [defendant bears the burden to establish that a different result is probable on retrial].)

Whether to grant or deny a motion for a new trial rests completely within the trial court's discretion, and we will not disturb its decision unless a manifest and unmistakable abuse of discretion clearly appears. (*People v. Howard, supra,* 51 Cal.4th at pp. 42-43; *People v. McDaniel, supra,* 16 Cal.3d at p. 179 ["A motion for a new trial on newly discovered evidence is looked upon with disfavor . . ."].) We determine whether there has been a proper exercise of discretion from the facts of each case. (*Howard*, at p. 43.)

Initially, no affidavit was presented in support of the motion. "When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable." (§ 1181, subd. 8.) Defendant submitted a memo by a defense investigator regarding alleged statements made by Moyer to the investigator. Defendant did not submit an affidavit from Moyer; nor did he present an affidavit by the defense investigator. Thus, he failed to meet a requirement of section 1181, subdivision 8 and the trial court could have properly denied the motion on this ground. (*People v. Beeler* (1995) 9 Cal.4th 953, 1005.)

Defendant contends, without citation to authority, that the trial court abused its discretion in not allowing him to testify at the hearing on his motion for a new trial that

he did not learn of the alleged affair between Moyer and Luttrell until after the trial. Although section 1181, subdivision 8 specifically requires the production of affidavits, it does not require that oral testimony be permitted. Nonetheless, defendant has not shown an abuse of discretion to decline to hear testimony that contradicted trial counsel's written representation.

Further, the proffered evidence was not newly discovered. The defense investigator's memo states defendant saw the text messages Luttrell allegedly sent Moyer, which were messages "of a sexual nature." According to the memo, the cell phone found on defendant's person when he was taken into custody contained most of the sexually graphic text messages which Luttrell had allegedly sent Moyer. The memo also indicates that defendant reportedly told Moyer that Luttrell left "tickets" on defendant's car daily, suggesting that defendant felt Luttrell was targeting him and he complained to Moyer about it. " 'Facts that are within the knowledge of the defendant at the time of trial are not newly discovered even though he did not make them known to his counsel until later.' " (*People v. Williams* (1962) 57 Cal.2d 263, 273 (*Williams*).) Defendant's contention that Luttrell did not identify himself in the text messages to Moyer is not based on any evidence in the record.

Even if defendant were unaware of the alleged sexual relationship between Moyer and Luttrell, defendant did not show that he could not, with reasonable diligence, have discovered and produced at trial evidence that Moyer and Luttrell's relationship went beyond the sexually explicit text messages of which, according to the defense investigator's memo that was proffered in support of the motion, defendant was aware. (*People v. Yankee* (1947) 79 Cal.App.2d 431, 437 [motion for new trial should be denied when the defendant does not show due diligence].) Defendant's motion does not explain why the defense failed to interview Moyer prior to the trial.

Moreover, defendant fails to show that evidence of Moyer's alleged sexual relationship with Luttrell, if considered by a jury, would render a different result probable

on retrial. (*People v. Delgado* (1993) 5 Cal.4th 312, 328-329 [witness' posttrial declaration implicating herself in the crimes of which the defendant was convicted did not warrant a new trial where the witness provided little inculpatory evidence against the defendant at the trial]; *People v. Green* (1982) 130 Cal.App.3d 1, 11 ["As a general rule, 'evidence which merely impeaches a witness is not significant enough to make a different result probable . . ."]; *People v. Yankee, supra,* 79 Cal.App.2d at p. 437 [motion for new trial on the ground of newly discovered evidence sought solely for impeachment purpose should be denied]; cf. *Williams, supra,* 57 Cal.2d at p. 271-275 [new trial proper where newly discovered evidence contradicted the sole evidence of the defendant's guilt at the trial]; *People v. Randle* (1982) 130 Cal.App.3d 286, 293-294 [trial court erred in denying motion for a new trial where the newly discovered evidence related to the complaining witness' credibility and the case rested on whether the complaining witness or the defendant was telling the truth]; *People v. Huskins* (1966) 245 Cal.App.2d 859, 862-866 [new evidence that raised grave doubts about the veracity of the sole adult witness connecting the defendant to the charged acts and raised the possibility of a false accusation made a different result on retrial probable].) Luttrell was not a witness at trial. And although defendant argues that evidence of a sexual relationship between Moyer and Luttrell could have undermined Moyer's credibility, Moyer was impeached at the trial with her inconsistent statements. Her actual testimony at trial regarding the events of the day of the shooting were helpful to *defendant* rather than to the prosecution.

She denied that defendant left home for a period of time on the day of the shooting, and said he simply "went outside." She denied telling Detective Jameson that defendant said, "You're going to be the reason why everything happens" before he left. She denied that defendant said she should "not talk to people and put them in that position." She said defendant told her instead that he did not know why Moyer put herself "in that position." When asked whether she heard the sound of metal clanking around when defendant was in the bathroom after he returned home, Moyer said

"[p]robably," and suggested the sound was "maybe a phone." She claimed to not remember telling Jameson about the sounds and denied that defendant told her that Crimmins would not be contacting her anymore. She said she did not recall telling Jameson that defendant said that. The prosecutor then called Jameson, who testified about Moyer's prior inconsistent statements to him.

Further, there was strong evidence of defendant's guilt independent of Moyer's pretrial statement and testimony. Contrary to defendant's claim on appeal, Moyer was not the only witness presented at the trial who established that defendant had made good on his previous threats against Crimmins. As defendant's trial counsel acknowledged in his closing argument, the People's case was based primarily on defendant and Crimmins' text messages.

The testimony of Crimmins and Nichols and data retrieved from the cell phone found on defendant's person at the time of his arrest, including text messages, established that defendant sent Crimmins threatening text messages about two months before the shooting, indicated he knew which car Crimmins drove, and told Crimmins if Crimmins texted Moyer again, "is gonna be bad." Crimmins and Moyer exchanged texts on the day of the shooting. Defendant then called or sent Crimmins a text, upset that Crimmins was communicating with Moyer. Defendant told Crimmins, "U gonna have to learn the hard way . . . I am have to do some to u." Crimmins and defendant arranged to meet at a particular location to fight. Ten minutes later, defendant sent Crimmins a text stating that defendant was at the location; there was no evidence of a text from defendant indicating he could not find Crimmins.

The shooting occurred near the arranged location, as Crimmins was leaving the apartment complex in the car he usually drove. The general description of the suspect car matched defendant's car. Crimmins testified that defendant was the only person who threatened him around the time of the shooting and that defendant knew Crimmins would

be at the location of the shooting that morning. While being treated for his injuries, Crimmins reported to police that defendant was the shooter.

There was no allegation within the new trial motion or surrounding proceedings that Moyer would provide defendant an alibi for the time of the shooting. Evidence of the alleged sexual relationship between Moyer and Luttrell does not call into question the content of the text messages we have described, nor does it relate to the testimony of Crimmins and Nichols. (See *Williams*, *supra*, 57 Cal.2d at p. 274-275 [defendant was entitled to a new trial where the newly discovered evidence contradicted the strongest evidence introduced against the defendant and came from an unexpected source]; *People v. Hall* (2010) 187 Cal.App.4th 282, 298 [noting that proffered new evidence was not directed at the strongest evidence against the defendant].)

Defendant fails to show manifest and unmistakable abuse of discretion in denying his motion for a new trial on the ground of newly discovered evidence.

C. *Brady Error*

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady, supra*, 373 U.S. at 87.) "[T]he duty to disclose such evidence is applicable even though there has been no request by the accused [citation], and that the duty encompasses impeachment evidence as well as exculpatory evidence . . . . Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' [Citation.] In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.' [Citation.]" (*Strickler v. Greene* (1999) 527 U.S. 263, 280-281.)

There are three components of a *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that

evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Strickler v. Greene*, *supra*, 527 U.S. at pp. 281-282.) To establish prejudice, the defendant must show that the suppressed evidence was material to the issue of guilt or innocence, i.e., there is a reasonable probability that, had the evidence been disclosed to the defense, the verdict would have been different. (*Ibid.*; *People v. Hoyos* (2007) 41 Cal.4th 872, 917-918 (*Hoyos*), disapproved on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 641-642 and *People v. Black* (2014) 58 Cal.4th 912, 920; *People v. Salazar* (2005) 35 Cal.4th 1031, 1056 [" 'The requisite "reasonable probability" is a probability sufficient to "undermine[ ] confidence in the outcome" on the part of the reviewing court.' "].) The mere possibility that the suppressed evidence might have helped the defense or might have affected the outcome of the trial does not establish materiality. (*Hoyos, supra*, 41 Cal.4th at p. 922.) To be material, the evidence must also do more than " ' "tend[ ] to influence the trier of fact because of its logical connection with the issue." ' " (*In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.)

In general, impeachment evidence is material where the witness supplied the only evidence linking the defendant to the crime or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case. (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1050.) "In contrast, a new trial is generally not required when the testimony of the witness is 'corroborated by other testimony.' " (*Ibid.*) We review the trial court's ruling on a motion for a new trial based on asserted *Brady* violation for abuse of discretion. (*Hoyos, supra*, 41 Cal.4th at p. 917, fn. 27.)

Although Moyer's pretrial statements incriminated defendant, as we have explained, those statements were far from the only evidence linking defendant to the shooting. Moyer's statement was corroborated by Crimmins' testimony about his communications with Moyer and defendant on the day of the shooting, defendant's own words in his text messages to Crimmins, Crimmins' and Nichols' testimony about the shooting and the suspect vehicle, and Crimmins' initial identification of defendant as the

shooter. Further, evidence that Moyer presented two different accounts of the relevant happenings was presented to the jury. Defendant has not demonstrated that introduction of additional evidence discrediting Moyer would have made any difference in the jury's assessment of her credibility. (*In re Sassounian, supra,* 9 Cal.4th at p. 550 [further impeachment evidence was not material where the witness was extensively impeached at the trial and overwhelming evidence supported the jury's special circumstance finding]; *U.S. v. Zagari* (2d Cir. 1997) 111 F.3d 307, 319-320 [evidence of witness's alleged insanity was not material under *Brady* where the jury had other information with which to evaluate his credibility and other evidence established the defendant's guilt].)

Further, according to the defense investigator's memo, defendant knew prior to the trial that Moyer and Luttrell were in some type of sexual relationship, yet defendant chose not to investigate how that relationship might have potentially affected Moyer's pretrial statements and testimony. Nor did defendant attempt to admit evidence of the alleged sexual relationship or cross-examine Moyer about that relationship. Defendant has also failed to show that disclosure of evidence by the prosecution would have changed the way he prepared for or presented his case at the trial.

Thus, even assuming without concluding that evidence of the alleged relationship was favorable to defendant and suppressed by the State, defendant has failed to show a reasonable probability of a different result had the prosecution disclosed that evidence. Accordingly, we reject his claim that the trial court erred in denying his motion for a new trial based on a *Brady* violation.

II

Prior Prison Term and Prior Conviction Enhancements

A. *Background*

As relevant here, the information charged defendant with one prior prison term enhancement and one prior conviction enhancement. The prior prison term enhancement was charged pursuant to section 667.5, subdivision (a) and based on defendant's 2013

conviction for violating section 246 (shooting at an inhabited dwelling house or occupied building).

Soon after the filing of the complaint and information, the section 667.5, subdivision (a) enhancement was misdescribed as a section 667.5, *subdivision (b)* enhancement, without explanation or amendment. At the time of the bench trial on the priors, the prior prison term enhancement was found true and classified correctly (as charged) as a section 667.5, subdivision (a) prior prison term. At sentencing, the enhancement again was announced as charged--a section 667.5, subdivision (a) prior prison term--but the sentence imposed was the one-year sentence corresponding to the subdivision (b) enhancement rather than the three-year sentence corresponding to the subdivision (a) enhancement. In the abstract of judgment, that same prison prior is classified as a section 667.5, *subdivision (b)* prior prison term.

Defendant was also charged with a section 667, subdivision (a)(1) prior conviction allegation that was found true, which was based on same conviction (§ 246) as the section 667.5 enhancement, for which the trial court imposed a five-year prison term at sentencing.

B. *Prior Prison Term Enhancement*

We begin with the enhancement that was originally charged under section 667.5, subdivision (a). The parties appear to agree that the three-year subdivision (a) prior prison term enhancement morphed (by way of an erroneous attachment to the minute orders) into a lesser (one year) subdivision (b) enhancement. Defendant challenges the enhancement for multiple reasons: insufficient evidence; erroneous use of the same section 246 prior conviction for both the section 667.5 and the section 667 enhancements; and subsequent law that has discontinued the section 667.5, subdivision (b) enhancement for all crimes but certain sex offenses.

The Attorney General concedes that the prison prior must be stricken for the latter two reasons. We shall modify the judgment to strike the prior prison term and in doing

so decide neither the precise classification of that term as "subdivision (a)" or "subdivision (b)" nor whether defendant had adequate notice that the enhancement had morphed. Simply put, it matters not.

Because the enhancement's imposition was based on the same (§ 246) prior conviction as that used as a basis for the (five-year) section 667 enhancement, the section 667.5 enhancement must be stricken. (*People v. Jones* (1993) 5 Cal.4th 1142, 1149-1153 [when section 667 and 667.5 enhancements are available for the same prior offense, only the greater enhancement may apply]; *People v. Perez* (2011) 195 Cal.App.4th 801, 805; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562.) Further, even if there were no section 667 enhancement or that enhancement is stricken on remand (see *post*), the section 667.5 enhancement is invalid. As defendant points out and the Attorney General concedes, the subdivision (a) enhancement is based on a crime of conviction (§ 246) that does not qualify as a permissible basis for that enhancement (see § 667.5, subd. (c)); thus, evidence of that prison term is not sufficient to support the true finding. The parties also agree that, if classified as charged and imposed pursuant to subdivision (b), the enhancement is no longer valid due to a change in the law. We will modify the judgment to reverse all true findings on the section 667.5 enhancement, regardless of subdivision, and strike the enhancement.

C. *Prior Conviction Enhancement*

Defendant argues that pursuant to Senate Bill No. 1393, the case should be remanded to allow the trial court to exercise its discretion to strike the section 667, subdivision (a) prior serious felony conviction enhancement. The Attorney General agrees and so do we.

At the time the trial court sentenced defendant, section 1385 did not authorize a trial court to strike a prior serious felony conviction enhancement under section 667. (§ 1385, former subd. (b), Stats. 2014, ch. 137, § 1.) Effective January 1, 2019, Senate Bill No. 1393 amended sections 667 and 1385, deleting the provisions in those statutes

which prohibited a trial judge from striking a section 667 prior serious felony conviction enhancement in furtherance of justice. (Stats. 2018, ch. 1013, §§ 1-2.)

Citing *In re Estrada* (1965) 63 Cal.2d 740, defendant argues that Senate Bill No. 1393 applies to him because his judgment is not yet final. He contends remand is required because the record does not clearly indicate that the trial court would not have stricken the section 667 enhancement even if it had the discretion to do so at the time of sentencing. The Attorney General concedes that remand is appropriate. We agree with the parties and remand for exercise of discretion.

III

Application of Section 654

A. *Count 7 -- Possession of Ammunition*

Defendant contends that the trial court erred in not staying the count 7 (possession of ammunition by a prohibited person) sentence under section 654 because counts 6 (possession of firearm by a felon) and 7 are part of an indivisible course of conduct. The Attorney General concedes error. We agree.

Section 654 precludes multiple punishments for a single act or indivisible course of conduct. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) "Whether offenses are 'indivisible' for these purposes is determined by the 'defendant's intent and objective, not the temporal proximity of his offenses.' " (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1215 (*Wynn*).) [Citation.] " 'If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " (*Id.* at pp. 1214-1215.) " 'If [a] defendant harbored "multiple criminal objectives," which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, "even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." ' . . . Where the commission of one offense is merely ' "a means toward the objective of the

commission of the other," ' section 654 prohibits separate punishments for the two offenses." (*Id.* at p. 1215.)

"We apply a substantial evidence standard of review. 'The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial.' [Citations.] '[T]he law gives the trial court broad latitude in making this determination.' [Citation.]" (*Wynn, supra,* 184 Cal.App.4th at p. 1215.)

We agree with the parties that the sentence on count 7 must be stayed pursuant to section 654 because there is no evidence that defendant possessed any ammunition in addition to the rounds in the firearm used to shoot Crimmins, and we find no evidence in the record that defendant had more than one objective in possessing a loaded firearm and possessing ammunition in that firearm. (*People v. Sok* (2010) 181 Cal.App.4th 88, 100; *People v. Lopez* (2004) 119 Cal.App.4th 132, 138.)

We add that the stay of the current 16-month term would result in an unauthorized sentence, as "[t]he one-third-the-midterm rule of section 1170.1, subdivision (a), only applies to a consecutive sentence, not to a sentence stayed under section 654." (*People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164.) When a sentence is required to be stayed under section 654, the trial court should impose a full-term sentence to ensure the "defendant's punishment is commensurate with his criminal liability" in the event that the stay is lifted. (*Ibid*.) We direct the trial court to select, impose, and stay a full-term sentence on remand.

B. *Count 6 -- Firearm Possession*

Defendant also argues that the trial court erred in not staying the count 6 sentence because possession of the firearm (count 6) and attempted premeditated murder (count 1) are part of an indivisible course of conduct. The Attorney General disagrees, and so do we.

"Case law establishes the guidelines for applying section 654 in the context of a conviction for possession of a prohibited weapon. ' "[W]here the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the [weapon] has been held to be improper where it is the lesser offense." ' " (*Wynn, supra,* 184 Cal.App.4th at p. 1217.) Whether the unlawful possession of a firearm and the offense in which the firearm is used is indivisible depends on the facts and evidence of each case. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).)

In *People v. Venegas* (1970) 10 Cal.App.3d 814, a section 654 stay was required in a case where the defendant was convicted of assault with a deadly weapon (namely a gun) and possession of the gun by a felon, and the evidence showed the unlawful possession of the gun only at the time the defendant shot the victim. (*Id.* at p. 820-821 [there was evidence defendant and the victim struggled for the gun before the defendant shot the victim]; see also *People v. Bradford* (1976) 17 Cal.3d 8, 22-23 [section 654 applies in assault with a deadly weapon and possession of a firearm by a felon case where the defendant wrested away the gun of a highway patrol officer and shot at the officer with the gun]; see *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412 (*Ratcliff*) [stating the rule that section 654 bars multiple punishment where the evidence shows that the firearm came into the defendant's possession fortuitously at the instant of committing another offense].)

In contrast, in *Jones, supra,* 103 Cal.App.4th 1139, section 654 was held inapplicable in a case where the defendant was convicted of shooting at an inhabited dwelling and being a felon in possession of a firearm, and the evidence showed that the defendant arrived at the scene of his primary crime already in possession of the firearm. (*Id.* at pp. 1142, 1145-1149.) The appellate court explained that the defendant committed

two separate acts: he armed himself with a firearm and he shot at an inhabited dwelling. (*Id.* at p. 1147.) The appellate court observed that the defendant necessarily had the firearm in his possession when he arrived at the victim's house and before he shot at the house. (*Ibid.*) His commission of the crime of possession of a firearm by a felon was complete the instant he had the firearm in his control prior to the shooting. (*Ibid.*; accord *Ratcliff, supra*, 223 Cal.App.3d at p. 1414.) And it was a reasonable inference that the defendant's possession of the gun was antecedent to his primary crime of shooting at an inhabited dwelling. (*Jones, supra,* 103 Cal.App.4th at p. 1147.) The appellate court further held that the evidence also supported the inference that the defendant harbored separate intents: intent to possess the firearm when he first obtained it and intent to shoot at the victim's house. (*Ibid.*; see also *Wynn, supra*, 184 Cal.App.4th at p. 1216-1218 [separate punishment for possession of deadly weapon and assault with a deadly weapon properly imposed where the defendant possessed the weapon before the assaults occurred]; *Ratcliff, supra*, 223 Cal.App.3d at pp. 1413-1414 [section 654 did not prohibit multiple punishments in a case where the defendant was convicted of two counts of armed robbery and one count of being a felon in possession of a handgun because a justifiable inference from the evidence was the defendant's possession of the handgun was not merely simultaneous with the robberies but continued before, during and after those crimes].)

Here, there is no evidence that defendant fortuitously came into possession of a gun at the moment he shot Crimmins. Instead, the evidence supports the inference that defendant brought a gun to the location where he agreed to meet Crimmins to fight and subsequently used that gun to shoot Crimmins. Defendant's commission of the crime of possession of a firearm by a felon was complete when he possessed the gun prior to the shooting. (*Jones, supra,* 103 Cal.App.4th at p. 1147; *Ratcliff, supra*, 223 Cal.App.3d at p. 1414.) Because he necessarily possessed a gun before he arrived at the location where he shot Crimmins, defendant's possession of the gun was antecedent to the attempted

murder of Crimmins. (*Wynn, supra,* 184 Cal.App.4th at p. 1216-1218; *Jones, supra,* 103 Cal.App.4th at p. 1147; *Ratcliff, supra,* 223 Cal.App.3d at pp. 1413-1414.) The evidence supports the inference that defendant committed two separate acts and he harbored separate intents. (*Jones, supra,* 103 Cal.App.4th at p. 1147.) We see no error.

IV

Abuse of Discretion in Imposing Consecutive Terms

Defendant next asserts the trial court abused its discretion when it incorrectly assumed the prison terms for counts 6 and 7 were required to run consecutively to each other as well as the attempted murder count. We reach the merits despite the Attorney General's claim that defendant forfeited his appellate claim by not objecting in the trial court, because defendant also raises ineffective assistance of counsel. Although the Attorney General argues that as a matter of law the "convictions did not arise from the same set of operative facts," we disagree. We agree that the trial court misunderstood its discretion here; thus, remand is required.

Section 667, subdivision (c)(6) provides that notwithstanding any other law, if a defendant has been convicted of a felony and it has been pleaded and proved that the defendant has one or more prior serious or violent felony convictions as defined in section 667, subdivision (d), the trial court must sentence the defendant consecutively on each count pursuant to section 667, subdivision (e) if there is a current conviction for more than one felony count not committed on the same occasion and not arising from the same set of operative facts. Conversely, "consecutive sentences are not mandated under subdivision (c)(6) . . . if all of the current felony convictions are either 'committed on the same occasion' or 'aris[e] from the same set of operative facts.' " (*People v. Lawrence* (2000) 24 Cal.4th 219, 223.)

The probation officer recommended consecutive sentences on counts 6 and 7. The trial court initially indicated it did not intend to follow the probation officer's recommendation and would instead impose concurrent sentences on those counts, but the

People argued that the court could not impose concurrent sentences "unless it is completely the same act" because this case "is not under 654," and "defendant clearly possessed ammunition and the gun prior to [the] shooting." Ultimately, the court agreed that it could not impose concurrent sentences on counts 6 and 7 and therefore did not.

The section 654 analysis is not relevant to the question of whether multiple current convictions are required to be sentenced consecutively under section 667, subdivision (c). (*People v. Deloza* (1998) 18 Cal.4th 585, 594 ["Indeed, section 654 is irrelevant to the question of whether multiple current convictions are sentenced concurrently or consecutively"].) Consecutive sentencing was not mandatory in this case. (See *id*., pp. 594-596.) Because the court misunderstood the scope of its discretion in sentencing counts 6 and 7, and did not realize that it was able to run those sentences concurrently to each other and/or to the sentence on the attempted murder count if it chose to do so, we will remand to the trial court for resentencing on count 6. (*Id.* at p. 600.) Because we have already concluded that sentence on count 7 should be full term and stayed, we do not address it further here.

V

Firearm Enhancements

Defendant argues, and the Attorney General agrees, that the case should be remanded for the trial court to exercise its discretion to strike the sections 12022.5 and 12022.53 firearm enhancement allegations pursuant to Senate Bill No. 620. We agree with the parties.

Effective January 1, 2018, Senate Bill No. 620 (2017-2018 Reg. Sess.) amended sections 12022.5 and 12022.53 to permit a trial court to strike the firearm use enhancements under those statutes. The amendments apply retroactively to cases not final on appeal and thus remand is appropriate. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) We will remand to allow the trial court

to exercise its discretion under sections 12022.5, subdivision (c) and 12022.53, subdivision (h).

VI

Ability to Pay

Defendant contends that, in light of *People v. Dueñas* (2019) 30 Cal.App.5th 1157, due process requires that this case be remanded for a hearing on his ability to pay the court operations and the court facility fees (totaling $320 and $240, respectively), and adds that his inability to pay the minimum restitution fine of $300 imposed at sentencing renders that fine in violation of the excessive fines clause of the Eighth Amendment to the United States Constitution. We disagree.

Our Supreme Court is now poised to resolve the due process issue, having granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844, which agreed with *Dueñas* that due process requires trial courts to conduct an ability to pay hearing and ascertain a defendant's ability to pay before it imposes court facilities and court operations assessments. (*Kopp*, at pp. 95-96, review granted.) In the meantime, we join the courts that have concluded that *Dueñas* was wrongly decided. (See, e.g., *People v. Kingston* (2019) 41 Cal.App.5th 272, 282; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1068 (*Aviles*); *People v. Caceres* (2019) 39 Cal.App.5th 917, 928-929.) We conclude the imposition of the challenged fees without consideration of ability to pay does not violate due process or equal protection and there is no requirement the trial court conduct an ability to pay hearing prior to imposing the challenged fees.

To the extent imposing potentially unpayable fees or fines on indigent defendants raises constitutional concerns, we agree that such challenges are properly analyzed under the excessive fines clause, which limits the government's power to extract payments as punishment for an offense. (*Aviles, supra,* 39 Cal.App.5th at p. 1069.) But we disagree that defendant's restitution fine of the minimum $300 is excessive.

" 'The Eighth Amendment prohibits the imposition of excessive fines. The word "fine," as used in that provision, has been interpreted to be " 'a payment to a sovereign as punishment for some offense.' " [Citation.]' [Citation.] The determination of whether a fine is excessive for purposes of the Eighth Amendment is based on the factors set forth in [*United States v. Bajakajian* (1998) 524 U.S. 321]. [Citation.]

" 'The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. [Citations.] . . . [A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.' [Citation.]

"The California Supreme Court has summarized the factors in *Bajakajian* to determine if a fine is excessive in violation of the Eighth Amendment: '(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay. [Citations.]' [Citations.] While ability to pay may be part of the proportionality analysis, it is not the only factor. [Citation.]" (*Aviles, supra*, 39 Cal.App.5th at p. 1070.)

We review the excessiveness of a fine challenged under the Eighth Amendment de novo. (*Aviles, supra*, 39 Cal.App.5th at p. 1072.) Having done so here, we find the $300 restitution fine imposed here is not grossly disproportional to the gravity of attempted murder with premeditation and deliberation, or defendant's culpability in these offenses. (See *United States v. Bajakajian, supra*, 524 U.S. 321; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728; *Aviles*, at p. 1072.) Further, ability to pay alone is not dispositive to an excessive fines analysis. (*Aviles*, at p. 1070.) This challenge fails.

VII

Abstract of Judgment

Defendant contends the abstract of judgment must be corrected in various respects. The Attorney General concedes error and we agree. We also see the need for additional corrections that we discuss *post*.

The jury found true as to count 1 (attempted murder) enhancements for discharge and personal use of a firearm, within the meaning of sections 12022.53, subdivision (c) and (b), respectively. The jury found true as to count 3 (assault with a firearm) an enhancement for personal use of a firearm within the meaning of section 12022.5, subdivision (a). The abstract of judgment erroneously lists the section 12022.53, subdivision (c) enhancement in count 1 as "12022.53(2) PC" and the section 12022.5, subdivision (a) enhancement in count 3 as "12022.53(d) PC." We will direct the trial court to correct those errors (if the enhancements are not stricken) when preparing the new abstract of judgment after resentencing on remand.[4]

VII

Additional Corrections and Full Resentencing

The sentences on counts 3, 4, and 5 as well as their associated enhancements must be full-term sentences if they are to be stayed pursuant to section 654, as we discussed *ante*. (See *People v. Cantrell, supra*, 175 Cal.App.4th at page 1164.) The trial court is directed to select, impose, and stay full-term sentences on these counts and enhancements on remand.

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[4] The parties also ask that the determinate sentences for the gun enhancements be reflected on the indeterminate abstract of judgment. We disagree that is necessarily required, as they are elsewhere reflected, but no matter where they appear the length of the sentences should be noted even if stayed, as we discuss *post.*

The determinate abstract of judgment does not reflect the length of the sentences as to the stayed counts and enhancements but merely reflects that they were stayed. The new abstract of judgment should accurately reflect the terms imposed on all counts and enhancements, even if stayed.

The trial court has a number of discretionary decisions as well as modifications to address on remand. Further, we have stricken and stayed portions of the previously-imposed sentence, as well as directed imposition of corrected terms. "[W]hen part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' (*People v. Navarro* (2007) 40 Cal.4th 668, 681, [citation].) [¶] Similarly . . . the Courts of Appeal have concluded that, under the recall provisions of section 1170, subdivision (d), the resentencing court has jurisdiction to modify every aspect of the sentence, and not just the portion subjected to the recall. [Citations.] In this situation, we have recognized that the resentencing court may consider 'any pertinent circumstances which have arisen since the prior sentence was imposed.' [Citation.] This principle, which we shall call the 'full resentencing rule,' has also been applied to recall and resentencing provisions enacted by Proposition 36, the Three Strikes Reform Act of 2012. [Citation.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 893.) We remand for full resentencing and preparation of new abstracts of judgment.

DISPOSITION

The true finding on the section 667.5, subdivision (a) allegation is reversed; the section 667.5 enhancement is stricken. The matter is remanded for full resentencing consistent with this opinion. Specifically, the trial court is directed to select, impose, and stay full-term sentences on counts 3, 4, 5, and 7, and all associated enhancements that remain after exercise of discretion. Remand is also ordered for exercise of discretion under sections 667, 12022.5, subdivision (c) and 12022.53, subdivision (h), as described by this opinion. As modified, the judgment is affirmed.

The trial court is directed to prepare new abstracts of judgment after the resentencing hearing, reflecting the corrections ordered by this opinion as well as any changes made on remand, and to forward a certified copy thereof to the Department of Corrections and Rehabilitation.

/s/
Duarte, J.

I concur:

/s/
Hoch, J.

MAURO, Acting P. J., Concurring and Dissenting.

I fully concur in the majority opinion except for part VI, pertaining to defendant's ability to pay the imposed fines, fees and assessments, as to which I dissent.

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157, the court held it is improper to impose certain fines or assessments without determining defendant's ability to pay. (*Id*. at pp. 1168, 1172.) Although some courts have subsequently criticized *Dueñas*'s legal analysis (see, e.g., *People v. Hicks* (2019) 40 Cal.App.5th 320, review granted Nov. 26, 2019, S258946), *Dueñas* remains citable precedent. Until the California Supreme Court has had an opportunity to resolve the current split in authority, I would remand this matter to give the trial court an opportunity to consider defendant's ability to pay the imposed fines, fees and assessments.

/s/
MAURO, Acting P. J.